IN THE COURT OF APPEALS OF IOWA

No. 0-297 / 09-1914
Filed June 30, 2010

IN THE MATTER OF THE ESTATE OF LOREN S. BOCKWOLDT, Deceased,

DALE RICHARD WILLOWS, Conservator for Brandie Renee Bockwoldt, the minor child of the Decedent.
Executor-Appellant.

Appeal from the Iowa District Court for Muscatine County, James E. Kelly, Judge.

A conservator appeals from the district court order awarding attorney fees to the attorney for the estate of Bockwoldt. **REVERSED.**

Wm. B. Norton, Christopher L. Surls, and Timothy L. Baumann of Wm. B. Norton Law Firm, P.C., Lowden, for appellant.

Daniel P. Kresowik and Kenza Nelson of Stanley, Lande & Hunter, Muscatine, for appellee.

Heard by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

TABOR, J.

Dale Richard Willows, conservator for Brandie Renee Bockwoldt, appeals from the district court order awarding attorney fees to Pete Wessels, attorney for the estate of Bockwoldt. The issue presented by this appeal is whether an attorney for an estate may be awarded attorney fees for the litigation of prior attorney fee applications. We find such attorney fees for fees are not recoverable and, accordingly, we reverse.

I. Background Facts and Proceedings. Loren and Tammy Bockwoldt, husband and wife, were killed in a car accident in March 2005. The estate was probated in Muscatine County, with Willows being appointed the conservator of the couple's minor child. Wessels was appointed as the attorney for the estate.

This is the third appeal of an award of attorney fees to Wessels for services performed for the estate. Wessels's first application sought $67,045 for ordinary and extraordinary attorney fees and expenses for services to the estate of Loren Bockwoldt. After the district court authorized an award in its entirety, Willows appealed. This court found the district court erred by failing to require Wessels to prove the reasonableness of his requested fees and remanded the issue to the district court "for a hearing requiring the applicant to meet his burden and for specific findings regarding the reasonableness of ordinary fees and extraordinary fees granted." *In re Estates of Bockwoldt*, No. 07-0531 (Iowa Ct. App. Dec. 28, 2007).

On January 30, 2008, Wessels filed another application for fees, seeking $55,942.61 in extraordinary fees, $20,432.89 in ordinary fees, and $640.50 in

expenses. Willows accepted the reasonableness of Wessels's request for $20,432.89 in ordinary fees and $640.50 in expenses, and also agreed to $18,413 of the extraordinary expenses. The district court granted Wessel's fee request in its entirety and Willows again appealed. Finding the district court failed to follow its instructions on remand to require Wessels prove the reasonableness of his fee request and to make a specific finding that the claimed extraordinary fees were reasonable, this court set aside the district court's award and approved only the fees and expenses Willows conceded for a total award of $39,486.39. *In re Estates of Bockwoldt II*, No. 08-1001 (Iowa Ct. App. April 8, 2009).

On August 24, 2009, Wessels filed a final report and application for extraordinary fees, in which he sought extraordinary fees and expenses accrued since February 1, 2007, for the litigation of his applications for fees and the subsequent appeals. He requested $15,845.50 in extraordinary fees and $631.79 in expenses, plus an additional $17,952.91 in extraordinary fees incurred through representation by Stanley, Lande & Hunter law firm. Willows resisted the application for extraordinary fees on August 31, 2009.

The matter came to a hearing on September 4, 2009. On December 14, 2009, the district court filed its order approving the fees and expenses requested by Wessels. The court found the extraordinary fees were for reasonable, necessary, and required services that were not ordinary services. It stated:

> These fees were incurred and made necessary by the appeals filed by the objector. The objector cannot logically claim that an executor and the executor's attorneys are prevented from defending against an appeal of a Court's decision regarding

> extraordinary fees. To accept the objector's argument means that anyone who wishes to appeal a heavily contested probate matter, can make the attorneys working for the executor, and presenting reasonable arguments to an appellate court, work for no pay.

Willows filed his notice of appeal from this ruling on December 16, 2009.

II. Scope and Standard of Review. A hearing on the costs of administration of an estate is in equity, and therefore this court's review is de novo. *In re Estate of Wulf*, 526 N.W.2d 156 (Iowa 1994); *Bass v. Bass*, 196 N.W.2d 433, 435 (Iowa 1972). We review the peculiar circumstances of each case to determine whether an executor "may legally obligate the estate for attorney's fees." *Wulf*, 526 N.W.2d at 156. Whether attorney's fees are allowed in estate actions is left to the considerable discretion of the trial court subject to appellate review. *In re Estate of Petersen*, 570 N.W.2d 463, 465 (Iowa Ct. App. 1997); *In re Estate of Brady*, 308 N.W.2d 68, 74 (Iowa 1981) ("Unless induced by legal error, the trial court's decision will be reversed only for abuse of discretion.").

III. Analysis. In Iowa, attorney fees are not to be awarded "in the absence of a statute or agreement expressly authorizing it." *Van Sloun v. Agan Bros., Inc.*, 778 N.W.2d 174, 182 (Iowa 2010). The Iowa Probate Code allows the personal representatives of an estate to collect "such reasonable fees as may be determined by the court for services rendered" with certain limitations on the total amount of fees collected in relationship to the gross assets of the estate. Iowa Code § 633.197 (2005). The code further provides:

> There shall also be allowed and taxed as part of the costs of administration of estates as an attorney's fee for the personal representative's attorney, such reasonable fee as may be

> determined by the court, for services rendered, but not in excess of the schedule of fees herein provided for personal representatives.

Id. § 633.198. The court is allowed to award fees to personal representatives of the estate and their attorneys "for actual necessary and extraordinary expenses and services." *Id*. § 633.199. "Necessary and extraordinary services shall be construed to also include services in connection with real estate, tax matters, and litigated matters." *Id.*

Section 633.315 states the criteria for collecting attorney fees from an estate:

> When any person is designated as executor in a will, or has been appointed as executor, and defends or prosecutes any proceedings in good faith and with just cause, whether successful or not, that person shall be allowed out of the estate necessary expenses and disbursements, including reasonable attorney fees in such proceedings.

There are no definite rules as to when an executor or administrator can legally obligate an estate to pay expenses and attorney fees connected with litigation; rather, the circumstances of each case must be assessed to determine if the fees are reasonably required or justified in the interest of the estate. *In re Estate of Jones*, 492 N.W.2d 723, 727 (Iowa Ct. App. 1992). For an attorney to be paid fees by a fiduciary it is generally necessary to show a benefit to the estate and just cause for pursuing the matter. *Id.*

The existence of good faith and just cause is ordinarily a question of fact for the trial court. *In re Estate of Olson*, 479 N.W.2d 610, 614 (Iowa Ct. App. 1991); *Brady*, 308 N.W.2d at 71. Whether good faith and just cause exist is measured objectively, not by the personal representative's reasonable relief.

Olson, 479 N.W.2d at 614. The applicant has the burden to show the services were reasonably necessary and the charges are in a reasonable amount. *Brady*, 308 N.W.2d at 73-74.

Whether an attorney for an estate may recover attorney fees for defending an application for attorney fees and its subsequent appeal is an issue of first impression in Iowa. Both parties direct us to authority from other jurisdictions in support of and against awarding attorney fees for making and defending fee applications.

The only jurisdiction to allow attorneys to recover from an estate fees on applications for fees is California. In the case of *In re Estate of Trynin*, 782 P.2d 232, 239 (Cal. 1989), the California Supreme Court held that extraordinary services compensable under its probate code "include work reasonably performed by the attorney to establish and defend the fee claim." Like Iowa, California's probate code provides a statutory basis for recovery of attorney fees for both ordinary probate proceedings and extraordinary services to an estate. *Trynin*, 782 P.2d at 234. Although one of the factors in determining the amount of compensation an estate attorney is entitled to is the benefit to the estate, prior California rulings have held that an attorney may be entitled to compensation even though the extraordinary services rendered "turn out to be entirely valueless." *Id.* at 235. Even though a service may not "directly benefit the estate in the sense of increasing, protecting, or preserving it," it would nonetheless be "compensable if the estate's attorneys or representatives in performing the

services were 'acting in consonance with the fiduciary duties imposed upon them.'" *Id.* (citation omitted).

In reaching its conclusion, the *Trynin* court noted that in other areas of law that provide a statutory right to attorney fees, recovery for fee-related services has been consistently allowed in California. *Id*. at 235-37. The court advanced a public-policy purpose for allowing the recovery of fee-related services:

> [I]f counsel is not compensated for expenses reasonably incurred in fee litigation, the compensation awarded for the underlying services may be effectively diluted or dissipated, and the fee will vary with the nature of the opposition. While fee litigation confers no immediate or direct benefit on the estate, it becomes a necessary incident to the attorney's work for the estate, and so compensable, when unjustified challenges are raised to a fee claim. Probate attorneys can hardly be expected to work for nothing, and if they have no reasonable assurance of full and fair compensation, they will be reluctant to undertake extraordinary services on behalf of decedents' estates.

Id. at 238. Ultimately, the court concluded

> a contrary rule would ultimately be deleterious to decedents' estates and heirs because attorneys would be reluctant to perform services necessary to the proper administration of decedents' estates if the compensation awarded for their services could be effectively diluted or dissipated by the expense of defending against unjustified objections to their fee claims.

Id. at 233.

In contraposition to the *Trynin* decision is the Michigan Court of Appeals case of *In re Estate of Sloan*, 538 N.W.2d 47, 48-50 (Mich. Ct. App. 1995), in which the court rejected a claim from an estate for an award of attorney fees and costs incurred in establishing and defending a petition for attorney fees. The court noted the Michigan probate code allows an estate's counsel to recover legal fees when services provided to an estate are "necessary" and provided "in

behalf of the estate." *Sloan*, 538 N.W.2d at 49. In its prior rulings, the Michigan courts had held "services rendered in behalf of an estate are compensable where the services confer a benefit on the estate by either increasing or preserving the estate's assets." *Id.*

In *Sloan*, the petitioners did not claim the legal services rendered in furtherance of the prior fee petitions resulted in a direct benefit to the estate, instead arguing they indirectly benefited the estate because a contrary rule would jeopardize the ability of estates to retain competent counsel. *Id.* The court refused to address the petitioners' argument, instead finding "fees for fees" claims "clearly do not benefit the estate because they do not increase or preserve the estate's assets." *Id.*

The *Sloan* court acknowledges the reasoning in *Trynin*:[1]

> Although we accept that this argument may have validity, we find the converse position to have coextensive validity: routine allowance of such claims might inhibit a beneficiary or other interested person from raising valid objections to fee petitions out of concern that the estate's assets will be diminished.

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[1] In reaching its result, the *Sloan* court notes the rulings from three other jurisdictions that disallow the recovery of fees for fees: *In re Painter's Estate*, 628 P.2d 124, 126 (Colo. Ct. App. 1981) ("The time spent litigating fees, as distinguished from time spent in actual administration of the estate, must be excluded in determining the proper fees which are chargeable against the estate."); *In re Estate of Halas*, 512 N.E.2d 1276, 1285 (Ill. App. Ct. 1987) ("Time spent preparing or litigating the fee petition does not benefit the estate and will not be allowed."); *In re Estate of Larson*, 694 P.2d 1051, 532-33 (Wash. 1985) ("We also hold that an attorney in probate is not entitled to an additional fee in proving the reasonableness of his fee in the final report."), *abrogated by statute*, Wash. Rev. Code Ann. § 11.96A.150(1) (2007). Although not cited by either party, the Connecticut case of *In re Andrews' Appeal from Probate*, 826 A.2d 1267, 1275 (Conn. App. Ct. 2003), also holds the recovery of fees for fees is unsupported by law. The Connecticut court observes: "As far as we can tell, *In re Estate of Trynin* has not been followed in any other state, even in states that, like California, have statutes that authorize an executor to recover attorney's fees under some circumstances." *Andrews*, 826 A.2d at 1274-75.

Id. at 50.

The case of *Inlow v. Inlow*, 735 N.E.2d 240 (Ind. Ct. App. 2000), is another that considered the propriety of allowing an estate's attorney to recover fees for preparation and defending of a fee application. Indiana's probate code states in pertinent part, "An attorney performing *services for the estate* at the instance of the personal representative shall have such compensation therefor out of the estate as the court shall deem just and reasonable." *Inlow*, 735 N.E.2d at 250 (emphasis in original).

After analyzing the holdings in other jurisdictions, the court ultimately determined such fees are not recoverable. *Id.* at 251-54. It concluded that "defending [a fees'] reasonableness cannot seriously be considered a service 'for the estate,' especially if the challenge results in a reduction of the proposed fee." *Id.* at 254. The court suggested the effort involved in defending a fee application "is a routine cost of doing business and must be factored into an attorney's hourly rate." *Id.*

Finally, the *Inlow* court recognized that "acrimony and litigiousness occasionally rear their ugly heads during estate administration and that probate attorneys may have to defend their fee petitions against baseless challenges brought by contentious heirs or legatees." *Id.* The court noted that a provision of the Indiana Code would allow the recovery of fees on fees if the court found the complaining party:

> (1) brought the action or defense on a claim or defense that is frivolous, unreasonable, or groundless;

> (2) continued to litigate the action or defense after the party's claim or defense clearly became frivolous, unreasonable, or groundless; or
> (3) litigated the action in bad faith.

Id. (quoting Ind. Code § 34-52-1-1(b)).

The common element between these cases and Iowa law is that to be compensated, the attorney's work must provide a benefit to the estate. How each jurisdiction determines what services are beneficial differs. On one end, California allows attorneys to recover fees for any service provided in consonance with the fiduciary duties imposed upon them, even if the service is an indirect benefit or turns out to provide no direct benefit at all. *Trynin*, 782 P.2d at 235. On the other end, Michigan only allows compensation for services rendered on behalf of an estate that "confer a benefit on the estate by either increasing or preserving the estate's assets." *Sloan*, 538 N.W.2d at 49. We must then decide whether an attorney's defense of a fee application is a benefit to the estate.

While not directly on point, our supreme court's decision in *Estate of Brady* provides guidance. In *Brady*, the district court declined to award expert witness fees to a witness who testified in support of fee applications for the estate's attorney. *Brady*, 308 N.W.2d at 74. The supreme court held,

> Again, the issue is not the value of the services but whether the estate should be charged for them. While the services helped attorney Heiserman, the trial court acted within its discretion in finding they did not benefit the estate. The trial court did not err in refusing to order the estate to pay for them.

Id.

We conclude an attorney's actions in defending a fee application are a personal benefit to the attorney and do not confer a benefit on the estate. We acknowledge the concerns articulated by the *Trynin* court and the district court regarding the need for counsel to be properly compensated. However, the *Sloan* court sets forth a competing interest; concern that valid objections to such applications may not be raised out of fear of depleting the estate's assets. We find the reasoning of the *Sloan* court more persuasive and note the method provided by the court in *Inlow*—zealous record-keeping by the estate's attorney and factoring the cost of litigating such applications into the attorney's hourly rate—would avoid most challenges to fee applications and allow adequate compensation for the work performed. And, as is the case in Indiana, our rules of civil procedure would allow for the recovery of attorney fees for defending a baseless challenge to an attorney fee application. *See* Iowa R. Civ. P. 1.413(1) (stating that where a petition is filed for "any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation," the court may impose an appropriate sanction, which may include an order to pay a reasonable attorney fee).

Because attorney fees may not be awarded for litigating an application for attorney fees under chapter 633, we reverse the district court's order in its entirety. Costs of the appeal are assessed one-half to each party.

REVERSED.